SIERRA CLUB

IBLA 80-308 Decided February 10, 1982

Appeal from a denial by the Utah State Office, Bureau of Land Management, of a formal protest of a decision excluding four units of land from wilderness study under the Federal Land Policy and Management Act of 1976. UT 050-233, UT 060-007, UT 060-011, UT 060-012.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Wilderness

While the extent of public support for wilderness preservation is not a proper factor to be considered during the inventory phase of the wilderness review mandated by sec. 603 of FLPMA, 43 U.S.C. § 1782 (1976), public comments which relate to the existence or non-existence of wilderness characteristics within an inventory unit must be evaluated.

2. Federal Land Policy and Management Act of 1976: Wilderness

While the existence of a realistic possibility that land within an inventory unit possesses wilderness characteristics is sufficient to require that the land be intensively inventoried, such land may be included within a wilderness study area (WSA), only where it is shown that the statutory criteria have, in fact, been met.

3. Federal Land Policy and Management Act of 1976: Wilderness

Where BLM has refused to designate an area as a wilderness study area (WSA), pursuant to sec. 603 of FLPMA, 43 U.S.C. § 1782 (1976), an appellant must not

> merely show that various errors may have occurred in the consideration of the unit, but is required to show that these errors resulted in an erroneous conclusion as to the units suitability for further study.

APPEARANCES: H. Anthony Ruckel, Esq., Sierra Club Legal Defense Fund, for appellant; Nikki Ann Westra, Esq., Office of the Solicitor, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

On August 15, 1978, the Director of the Bureau of Land Management (BLM) authorized an accelerated wilderness inventory of certain units of land under BLM's management in order to evaluate proposed electrical transmission line routes and power plant locations for the Intermountain Power Project (IPP). This accelerated inventory was undertaken pursuant to sections 201(a) and 603 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1711(a) and 1782 (1976), which required BLM to evaluate all land under its management to determine which areas might possess wilderness characteristics. Among the units evaluated in connection with the IPP study were the four units in Utah which are the subject of this appeal. One of these, designated UT 050-233 in the Richfield District, was excluded from further review by a May 25, 1979, decision of the Acting Utah State Director. A second decision by the Utah State Director, dated September 20, 1979, excluded the other three units lying in the Moab District and designated UT 060-007, UT 060-011, and UT 060-012. In both cases, the decisions excluded the referenced units because they lacked wilderness characteristics. 1/

1/ Section 603 of FLPMA requires BLM to report to the President its conclusions about the suitability or nonsuitability of all the public lands within its charge for preservation as wilderness. In order to be deemed suitable such lands must meet essentially the following standards: (1) Each must be roadless; (2) each must be of a size of 5,000 acres or more; and (3) each must possess the wilderness characteristics described in section 2(c) of the Wilderness Act of 1964. Section 2(c) of the Wilderness Act of 1964 reads as follows:

"A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this Act an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value."

On October 19, 1979, appellant Sierra Club filed a formal protest regarding those portions of the decisions affecting the referenced units. The Utah State Director denied the protest on December 12, 1979, and Sierra Club took this appeal from that denial on January 10, 1980.

On appeal, Sierra Club presses a number of arguments. Initially, it argues, that in addition to the criteria listed in section 603 of FLPMA (thus, by reference, those listed in section 2(c) of the Wilderness Act of 1964) for determining the wilderness characteristics of any unit, BLM considered four criteria which were not relevant to the question of wilderness characteristics, and that these considerations invalidated its conclusions. We will discuss these four alleged criteria seriatim.

[1] First, Sierra Club argues that BLM considered public support as a factor in reaching the subject decisions. In particular, it contends that BLM apparently tallied the public comments as to their support for or opposition to wilderness designation, rather than giving thoughtful consideration to specific comments. Sierra Club supports this argument by referring to certain language in the "Rationale" section of BLM's "Public Comment Evaluation for AM/DM Recommendation for IPP Wilderness Review," specifically the statement that "[c]omments were general with the large majority being anti-wilderness [designation] in nature."

In support of its view that the statute and regulations prohibit consideration of the extent of public support for wilderness preservation, Sierra Club points to the fact that FLPMA makes no mention of public support as a factor in wilderness evaluation and further directs attention to that portion of Change 2 to BLM Organic Act Directive (OAD) 78-61 which "prohibits consideration of the 'degree of public support for preservation of additional wilderness areas' in the intensive inventory" (Statement of Reasons at 8).

While Change 2 to OAD 78-61 actually deals with procedures for initial inventories rather than intensive inventories (as occurred herein), the principle which appellant cites is nevertheless applicable to the instant case. The comment process is designed not to elicit opinions from the public as to the desirability of the wilderness program, but rather is aimed at developing information relating to the existence or nonexistence of roads, or other wilderness characteristics within an inventory unit area. Thus, while generalized comments either supporting or opposing wilderness designation would be of little utility, comments which related to specific statutory criteria, when accompanied by supporting data, i.e., evidence that a "way" was, in fact, mechanically maintained by specified individuals, were properly subject to evaluation in the inventory decision.

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fn. 1 (continued)

A 31,360-acre portion of UT 060-007 was actually designated as a WSA by the decision of Sept. 20, 1979, but other portions of the unit were excluded from further review.

The problem which we have with appellant's argument is that there is nothing in the record which could fairly be said to give rise to the conclusion that public support was "weighed" in any type of improper manner. The "Public Comment Evaluation and Rationale" form under the "Rationale" section directed the preparer to enter his "[c]onclusions as to the relevancy of input to recommendations for the unit." There then follows this parenthetical direction: "(Note: 'HIGHLIGHT' the comment or comments that had motivating effect on AM/DM recommendation for the unit)." In light of these directions, the preparer's pronouncement that "[c]omments were general with the large majority being anti-wilderness in nature," besides being accurate, does not easily give rise to the interpretation which Sierra Club has sought to place upon it. Indeed, insofar as the preparer did not "highlight" any comments with "motivating effect," the preparer's report seems more susceptible of the interpretation that none of the comments were particularly relevant to recommendations for the various units than the interpretation urged by the Sierra Club. Moreover, in a letter to appellant, dated February 15, 1980, the Utah State Director addressed this precise contention:

> It is incorrect for you to assume that general comments were weighed equally with detailed/specific comments. Comments that provided documented specific information on individual areas were given greater weight than general comments. A lengthy letter is not necessarily a letter containing specific comments, if it is merely an opinion stated in some detail without specific, or factual information to support it. In such cases where specific information was not given, the comment would be treated as a general comment. The content of the letter or comment relative to the wilderness characteristics was evaluated, and not necessarily the number of comments or the length of the letter.

We have found nothing in the record which would indicate that BLM considered the public comments in any fashion other than that expressed by the State Director in that letter.

[2] Appellant also contends that its comments on all the areas in question raised some doubt about the proposal not to include those areas in the intensive inventory (the second stage of wilderness evaluation). Noting that Change 2 to OAD 78-61 provides that if any comment raises a valid doubt about the proposal, then it is not "clear and obvious" that wilderness characteristics are lacking; Sierra Club argues that those units must be kept in the intensive inventory. There are multiple problems with this analysis.

Initially, we would note that the argument itself discloses a fatal lack of understanding of the process involved in BLM's wilderness review. As we have noted many times, the wilderness review mandated by section 603 of FLPMA consists of three separate parts: (1) Inventory, (2) study, and (3) reporting. The inventory phase "was designed to determine and demarcate those areas of the public lands which were possessed of the wilderness criteria established by Congress." Union Oil Co. (On Reconsideration), 58 IBLA 166, 170 (1981). The inventory

process was, itself, bifurcated into two separate phases: (1) The initial inventory, and (2) the intensive inventory.

The initial inventory was designed to eliminate lands which "clearly and obviously" lacked wilderness characteristics. See Jerry D. Reynolds, 54 IBLA 300 (1981). This determination was to be made from existing and readily available information which would not normally include on-site examination of an area. Indeed, a key purpose behind the initial inventory was to obviate the need for on-site inspections of lands which were unarguably nonwilderness in character. As a corollary, however, where a realistic possibility existed that the land might possess the requisite wilderness characteristics then the land was to undergo an intensive inventory, which involved a detailed on-site inspection as an aid in determining whether or not the various wilderness criteria existed within specified units.

Appellant's basic mistake is its failure to recognize that the accelerated inventory which occurred herein was an "intensive" inventory. The criteria which it cites from Change 2 relate to whether a unit should be subject to the intensive inventory process; it does not relate to whether an area, already intensively inventoried, should be placed in a WSA. Having made a detailed on-site analysis, BLM may only designate a unit or part thereof as a WSA where it has determined that the mandate of the statute has been met, and not merely where some "doubt" may exist as to fulfillment of the statutory prerequisites. Sierra Club's argument in this point must be rejected.

[3] Next, Sierra Club contends that the inventory improperly compared wilderness values of some units with units UT 060-011 and UT 060-012, and thereby, disqualified the latter units from consideration despite the language in Change 3 to OAD 78-61 (dated July 12, 1979) that "there must be no comparison among units." (Emphasis in original.) In support of its position, Sierra Club notes the use of the following phrases in the BLM reports on the subject units: (As to UT 060-011) "scenery is only fair, average for the area. Much better opportunities for primitive recreation are available in other units in the area * * *"; "Scenic values in this area are only fair, no better than average for the surrounding region. There are some supplemental geologic values * * *, but better examples occur to the south around Cedar Mountain"; (as to UT 060-012) erosional landforms "are occasionally colorful and of varied textures, but are typical of the general area * * *"; "[t]he opportunities for solitude that are present are limited in area and are typical rather than outstanding." (Emphasis supplied in all instances shown above.)

While certain remarks are clearly contrary to the thrust of Change 3, we do not find them sufficient to invalidate the ultimate conclusions. First, several of the cited comments concerned "supplemental values" rather than the question of the existence of outstanding opportunities for solitude and primitive and unconfined recreation to which the OAD prohibition, pertaining to unit comparison, is directed. Moreover, terms such as "outstanding," "fair," and "poor," being relative, cannot be ascribed without any comparative process. Second, Change 3 to OAD 78-61 (which contains the comparison "prohibition") is dated July 12, 1979, almost 2 months after the subject reports. It is,

thus, not surprising that the OAD was not followed in every detail. It should be remembered, in any event, that the Wilderness Inventory Handbook (WIH) and its amendments are guidelines. While it was clearly contemplated that they would be followed by all Bureau personnel, it was never contended that they represented the only possible method for complying with the Congressional mandate.

The Board has long noted that while instruction memoranda are binding upon BLM employees, they are not binding either on this Board or on the general public. Bryner Wood, 52 IBLA 156, 162 n.2, 88 I.D. 232, 235 n.2 (1981); Milton D. Feinberg, 37 IBLA 39, 85 I.D. 380 (1978), sustained (On Reconsideration), 40 IBLA 222, 86 I.D. 234 (1979). The ultimate question is not whether BLM employees flawlessly follow every direction contained in the WIH; rather, the real question is whether or not the BLM decision correctly applies the statutory criteria. The mere fact that BLM employees were not sufficiently prescient to anticipate that future actions by the BLM Directorate might prohibit actions they were then taking is insufficient, in the absence of an affirmative showing by appellant that a differing determination would result if the subsequent directions were implemented, to invalidate an evaluation process which has already occurred.

Moreover, we would point out that the Wilderness Act itself defines a wilderness as having "outstanding opportunities for solitude or a primitive and unconfined type of recreation." 16 U.S.C. § 1131(c) (1976). It seems clear to us that insofar as the question of opportunities for solitude is concerned a comparison process is mandated by the statute since only those areas with outstanding opportunities are properly deemed to be wilderness. A number of the statements which we cited above clearly fit into this class of statements. Thus, the statement that "the opportunities for solitude that are present are limited in area and are typical rather than outstanding," is, in our view, totally permissible under the WIH and its supplements. What is prohibited is the cross-comparison of two outstanding opportunities in order to ascertain which is superior. Once it is determined that the opportunity for solitude or a primitive and unconfined type of recreation is "outstanding," it is irrelevant, for the purpose of determining suitability for designation as a WSA, that neighboring units have superior opportunities.

As we noted above, however, it is appellant's obligation to show not only mistake in methodology, but to prove error in result. This, Sierra Club has not done. The reports and record documentation provide ample support for the ultimate BLM recommendations quite independent of any questioned comparisons.

Appellant objects to BLM's asserted reliance on the absence of water in UT 060-012 as a determinative factor in its evaluation of the unit's lack of wilderness characteristics, pointing out that Change 3 provides that "the * * * absence of water is not a valid basis for concluding that an outstanding primitive recreation opportunity does not exist." Once again, we would point out that Change 3 to OAD 78-61 was promulgated almost 2 months after the reports utilized herein. Moreover, again there are ample other factors described in the report which

would support BLM's ultimate conclusion, and appellant has once again failed to carry the burden of showing error in the ultimate conclusions reached.

Sierra Club also objects to BLM's "updated" reliance on the lack of vegetation screening and broken topography in concluding that neither UT 060-011 nor UT 060-012 offered outstanding opportunities for solitude. Again appellant relies on Change 3 to OAD 78-61 to support its position. Sierra Club asserts that "solitude can exist in flat areas which do not have vegetative screening." While we agree that such could well be the case, the real question is, as we have repeatedly indicated, whether the units involved herein actually possessed outstanding opportunities for solitude. Even the OAD does not prohibit the consideration of such factors as lack of screening. It merely says that the lack of such factors should not lead to the conclusion that an area "automatically lacks an outstanding opportunity for solitude." (Emphasis supplied.)

Moreover, there is no support in the record for the assertion that "BLM repeatedly relies on vegetation screening and broken topography as prerequisites to finding outstanding opportunities for solitude" (Statement of Reasons, 11). (Emphasis supplied.) Although topographic relief and vegetative screening are mentioned prominently in the reports for UT 060-011 and UT 060-012, it must also be noted that the portion of the UT 060-011 which does not evidence human intrusions is relatively small, and thus, there is correlative increase in the importance of topographic relief or vegetative screening. Insofar as UT 060-012 is concerned, while its areal extent is considerably larger than UT 060-011, it also displays a pattern of considerable past vehicular use making topographic relief and vegetative screening more important to a finding of outstanding opportunities for solitude in the unit than might otherwise be the case. The Board finds, in summary, that BLM did not rely on improper criteria in determining that the units appealed herein should not be placed in WSA's for further study. 2/

Sierra Club also complains that two contiguous units were improperly evaluated separately when they should have been evaluated together. The separation resulted from the presence of a county boundary. Appellant points out that OAD 78-61 requires that units of roadless areas must be bounded either by a road or nonpublic lands and that Change 3 to OAD 78-61 (dated July 12, 1979) allows artificial boundaries like

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2/ In a development related to the public comment issue, Sierra Club has filed an Amendment to Statement of Reasons in which it directs attention to the contents of the minutes of a staff meeting on Dec. 12, 1978, in the Moab District of Utah BLM. Therein it is explained that the District Director proposed a wilderness evaluation policy of concentrating on prime areas and excluding those about which there is some doubt. This, of course, would be contrary to BLM policy as stated in OAD 78-61. However, as objectionable as such an attitude might be, there has been no showing that the policy was ever put into effect as a general matter and certainly none that it affected the subject wilderness evaluations.

those around legal subdivisions, for some units but only in "special cases." This, contends appellant, is not a special case.

There is little doubt that BLM failed to follow the letter of OAD 78-61 in considering the subject units separately. However, appellant's suggestion that "BLM's piecemeal approach precludes an objective evaluation of this area as a whole" and that "wilderness criteria were improperly assessed" do not necessarily follow. Where two divided units are both less than 5,000 acres in size but together are in excess of 5,000 acres, clearly a "piecemeal approach" to considering these two units would be prejudicial, since only acreage in excess of 5,000 acres can be treated as a section 603 WSA. See Tri-county Cattlemen's Association, 60 IBLA 305, 314 (1981). However, no other example of such prejudice easily comes to mind, especially where, as here, the subject units are so large that presumably they would meet wilderness criteria or not on their own. Indeed, parts of unit UT 060-007 were proposed as wilderness areas, and those parts not so designated were rejected partly because of the imprint of man's work. It is hard to understand how such intrusions would disappear simply because those parts of UT 060-007 were considered with UT 050-233. It appears, therefore, that there would be no change in result even if the units were considered together. In any event, we are not prepared to reject BLM's conclusions merely on the basis of a procedural failure without a showing of substantial prejudice resulting therefrom. Sierra Club has made no such showing, and the record reveals none. 3/

Finally, it is Sierra Club's position that since the Secretary has selected an alternate IPP routing "there is no longer any justification for accelerated review." Sierra Club argues that the appropriate course to take now is "to accord these areas full statewide wilderness review." Apparently, appellant wants a second review to be undertaken now, since the first review was "accelerated." Intrinsic to Sierra Club's argument is a perception that an "accelerated review" is somehow less adequate or less thorough than a "full statewide wilderness review." This contention is simply wrong. What is accelerated in an "accelerated review" is the intensive inventory phase. Rather than delay an intensive inventory, which means waiting for completion of the initial inventory, an acceleration of review results in an immediate intensive inventory. The intensive inventory process, however, while "accelerated" is in no manner or form different from the normal intensive inventory. To suggest that, for some unarticulated reason, the intensive inventory process should be duplicated where there is no indication that the accelerated nature of the review led to any inadequacies, is to suggest that the Government go to the great trouble and expense to redo what it has already done so that it may conclude what it has already concluded. We will not accede to appellant's request.

Although appellant has raised some points about BLM's evaluation of the subject units which are not inconsiderable, there has been nothing raised about any BLM conclusions which would lead us to believe that BLM's evaluations were biased or prejudiced in any manner or that BLM committed any substantive error in its evaluation.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed for the reasons stated herein.

James L. Burski
Administrative Judge

We concur:

Edward W. Stuebing
Adminstrative Judge

Gail M. Frazier
Administrative Judge

3/ Appellant's protest concerning the exclusion of unit UT 050-233 was untimely filed. We have considered that unit only in order to examine Sierra Club's contention that UT 060-007 should have been combined with UT 050-233 in the accelerated review process.